No. 10-551

IN THE

Supreme Court of the United States

KEITH LITMAN, ET AL.,

Cross-Petitioners,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") requires the enforcement of a drafting party's express agreement not to arbitrate but to litigate in court if the class action ban in the arbitration agreement is unenforceable, where that party incorporates state law under its choice-of-law provision that contractual class action bans are unenforceable.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Cross-Respondent in this case is Cellco Partnership d/b/a Verizon Wireless. Cellco Partnership d/b/a Verizon Wireless has four partners. Two of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"). These partners are: Bell Atlantic Mobile Systems, Inc. and GTE Wireless Incorporated (collectively, the "Verizon Partners"). None of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"). These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). None of the Vodafone Partners is publicly held.

Verizon is a publicly held Delaware corporation. Vodafone is a publicly held British corporation. Neither Verizon nor Vodafone has a parent company, and no publicly held company has a 10% or greater ownership in either entity.

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BRIEF IN OPPOSITION

Cross-Respondent Cellco Partnership d/b/a Verizon Wireless respectfully submits this brief in opposition to Cross-Petitioners' conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT

As an initial matter, Cross-Petitioners concede that the petition in No. 10-398 satisfies the Rule 10 standard for granting certiorari. Cross-Pet. at 13.[1] Given the "substantially identical facts," *id.*, in *Cellco Partnership v. Litman*, No. 10-398, and in *AT&T Mobility LLC v. Concepcion*, No. 09-893, the Court should at a minimum hold the petition in No. 10-398 pending its decision in *Concepcion*. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted[.]"). As Cross-Respondent has explained previously, the petition in 10-398 should be granted in its own right as it presents an alternative theory of preemption under the FAA that was not principally relied upon by the petitioner in *Concepcion*. Pet. at 3-4; *see id.* at 13.

The cross-petition, however, should not be granted. First, the question presented is not worthy of this Court's review. Cross-Petitioners ask the Court to address a narrow question involving the interpretation

[1] References to "Pet." and "Pet. App." are to the petition and appendix filed in No. 10-398; references to "Cross-Pet." are to the conditional cross-petition filed in No. 10-551.

of one arbitration clause under New Jersey law. This court does not sit in review of federal-court determinations of state law. Moreover, Cross-Petitioners concede that the question has not been decided by any court of appeals, including the court below. Cross-Pet. at 12,13.

Second, Cross-Petitioners are wrong on the merits. They ask the Court to review the question whether the New Jersey Supreme Court's decision in *Muhammad* v. *County Bank of Rehoboth Beach*—which held unenforceable a class-arbitration waiver in a payday loan agreement, *see* 912 A.2d 88 (N.J. 2006)—triggers the "blow up" clause in the arbitration agreement at issue here. That clause provides that if the waiver of class arbitration "is deemed unenforceable" then the arbitration clause as a whole will not apply, requiring the parties to resolve their dispute through litigation. Cross-Petitioners characterize this issue as antecedent to the FAA preemption question presented in No. 10-398. Cross-Petitioners' reading of the arbitration clause makes no sense. It would mean that even though state law requiring class arbitration is preempted by the FAA—and class arbitration is therefore not legally required—the "blow up" clause would still operate to nullify the entire arbitration agreement. But the "blow up" clause only operates to prevent arbitration where the express exclusion of class arbitration "is deemed unenforceable." Where New Jersey law negating the ban on class action arbitration is itself preempted by federal law there is no requirement of class arbitration and thus the ban on class actions cannot be "deemed unenforceable." *Muhammad* is capable of rendering the class-arbitration waiver unenforceable (thus triggering the "blow up" clause) *only if it survives FAA*

preemption, especially given that the arbitration agreement expressly invokes the FAA.

REASONS FOR DENYING THE CROSS-PETITION

I. Cross-Petitioners Concede That The Petition In No. 10-398 Satisfies The Rule 10 Standard For Granting Certiorari.

In its petition in No. 10-398, Cross-Respondent seeks this Court's review of the question whether the FAA preempts States from conditioning the enforcement of arbitration agreements on the availability of class-wide arbitration. *See* Pet. at i. As Cross-Respondent has explained, its petition satisfies the Rule 10 standard for granting review given the Court's grant of certiorari in *AT&T Mobility LLC v. Concepcion*, No. 09-893, a virtually identical case presenting the same overarching question of federal law. *See* Pet. at 11-13. Cross-Petitioners concede that at least a hold of Cross-Respondent's petition is warranted, emphasizing that *Litman* and *Concepcion* involve "substantially identical facts." *See* Cross-Pet. at 13. As this Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted," *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting), the Court should at least hold the petition in No. 10-398.[2]

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[2] Numerous federal district courts have recognized the strong identity of issues between this case and *Concepcion* and have stayed further proceedings in cases involving Verizon Wireless's arbitration clause pending this Court's ruling in

(Cont'd)

II. The Question Presented In The Cross-Petition Does Not Warrant Review.

Cross-Petitioners ask the Court to review what they describe as a question antecedent to the one raised in the primary petition—whether *Muhammad* triggers the so-called "blow up" clause in the arbitration agreement at issue,[3] thereby requiring the parties to proceed to litigation rather than arbitration. *See* Cross-Pet. at 2 (describing this as a "precedent" issue). This question does not warrant review for two reasons.

First, this question is inherently unsuited for this Court's review. It is, at bottom, a question of state law regarding the meaning of several provisions of a

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Concepcion. *See, e.g.*, *Homa v. Am. Express Co.*, No. 06-2985, 2010 WL 4116481, at *8 (D.N.J. Oct. 18, 2010) ("Advancing this litigation while the issue of FAA preemption/preclusion with respect to voiding class-arbitration waivers based upon state law unconscionability principles—an identical, and dispositive, issue in *Homa*, *Litman*, and *Concepcion*—is squarely before the Supreme Court may be an exercise in futility."); *see also* Order at 2, *Sobel v. Cellco P'ship*, No. 10-CV-3312 (D.N.J. Oct. 29, 2010) ("[B]ecause the issues in contention in *Concepcion* are similar to the case at bar, the outcome of that case may substantially affect or be dispositive of this action."). A hold of the primary petition is necessary to ensure that the Third Circuit, like the Ninth, may apply this Court's guidance in *Concepcion* to the numerous similar cases pending within its jurisdiction.

[3] *See* Joint Appendix on Appeal, VOL. II, at A72 ("IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS . . . IS DEEMED UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY.").

consumer contract. Unlike *Concepcion* and the primary petition in this case, the cross-petition does not ask this Court to interpret and apply the FAA. Rather, it asks the Court to answer what it describes as "an issue precedent" to the preemption question—whether the agreement itself calls for arbitration in the first place given the supposed interaction of the "blow up" clause with the choice of New Jersey law. This issue does not require the Court to interpret or apply any provision of the FAA; it is strictly a matter of contract interpretation under state law. And this Court does not sit in review of the lower federal courts' interpretations of state law. *See Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) ("[T]his Court normally follows lower federal-court interpretations of state law."). Moreover, Cross-Petitioners candidly concede that no court of appeals or either of the courts below has ever even addressed the issue they raise here. Cross-Pet. at 12-13.

Second, Cross-Petitioners are wrong on the merits. What Cross-Petitioners seek to do—sidestep FAA preemption altogether—is precluded by numerous provisions of the arbitration clause and the entire contract. The "blow up" clause is only triggered if the class-arbitration waiver "is deemed unenforceable." And whether the class-arbitration waiver is "unenforceable" is of course a question of *both* state and federal law. By operation of the Supremacy Clause, state law that conflicts with either the terms or the objects and purposes of the FAA is invalid and "must give way." *Perry v. Thomas*, 482 U.S. 483, 490-491 (1987). Thus, New Jersey law is incapable of rendering the class-arbitration waiver unenforceable (and triggering the "blow up" clause) unless it survives FAA preemption.

To hold otherwise would mean that *Muhammad* would render the class-arbitration waiver unenforceable even if it were preempted by the FAA. Such a ruling would defy logic. Indeed, it would enable Cross-Petitioners to circumvent FAA preemption by a truly circular reading of the contract.

Even were it an issue of federal law worthy of this Court's review, Cross-Petitioners' construction of the arbitration agreement is untenable. It is undisputed that the parties agreed that the FAA would apply to their arbitration agreement. *See* Cross-Pet. at 7 ("(1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT.") (quoting Joint Appendix on Appeal, Vol. II, at A54). In addition, it is undisputed that the choice-of-law provision in the arbitration agreement subjects applicable state law to federal override. *See* Cross-Pet. at 8 ("*Except . . . as required by Federal law*, this agreement and disputes covered by it are governed by the laws of the state encompassing the area code assigned to your wireless phone number . . . .") (emphasis added) (quoting Joint Appendix on Appeal, Vol. II, at A55, A72). To find that *Muhammad* triggers the "blow up" clause without considering the FAA preemption question would render the parties' invocation of the FAA a nullity.

Finally, Cross-Petitioners argue that the decision below somehow conflicts with three Supreme Court decisions. *See* Cross-Pet. at 14-15 (invoking Supreme Court Rule 10(c) and citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); and *Stolt-Nielsen S.A. v.*

AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010)). But Cross-Petitioners fail to explain how any of these decisions is in conflict with the lower court's decision. Moreover, none of these decisions support Cross-Petitioners' argument that the "blow up" clause precludes the operation of federal law, as each applies the FAA to particular arbitration clauses before the Court.

In *Volt*, the Court considered whether the California law at issue was preempted by the FAA *before* holding that the law applied to the arbitration agreement between the parties before the Court. 489 U.S. at 477-78. Indeed, Cross-Petitioners concede this point. *See* Cross-Pet. at 17. *Volt* thus does not in any way suggest that an arbitration agreement that expressly invokes the FAA can be read to ignore FAA preemption in the application of a clause that is triggered when a provision of the agreement is "deemed unenforceable."

Like *Volt*, *Mastrobuono* and *Stolt-Nielsen* do not aid Cross-Petitioners' cause. Cross-Petitioners appear to rely on *Mastrobuono* and *Stolt-Nielsen* for the basic proposition that arbitration agreements should be enforced as written. Cross-Pet. at 18-23 (reciting various basic rules of contract construction discussed in *Mastrobuono* and *Stolt-Nielsen*). Cross-Respondent, of course, has no quarrel with this proposition, as "'[t]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.'" *See* Pet. at 30 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1773); *see also* 9 U.S.C. § 4. Like *Volt*, nothing in either *Mastrobuono* or *Stolt-Nielsen* even remotely suggests that an arbitration agreement that

expressly adopts the FAA as applicable law can be read to ignore the effect of FAA preemption in assessing whether a part of the arbitration agreement has been "deemed unenforceble." Indeed, as Cross-Petitioners recognize, *Stolt-Nielsen* stands for the principle that "[c]onstruction of the arbitration agreement must be predicated on [both] FAA and state law." Cross-Pet. at 23 (citing *Stolt-Nielsen*, 130 S. Ct. at 1768-69).

CONCLUSION

For the foregoing reasons, this Court should deny the cross-petition for a writ of certiorari.

Respectfully submitted,

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